

# EXHIBIT A



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2 APPEARANCES:

3 Dirk D. Thomas, PLLC,  
4 by Dirk D. Thomas, Esq.

5 - and -

6 The Law Firm of Brandon M. Jordan, PLLC  
7 by Brandon M. Jordan, Esq.

8 On behalf of the Plaintiff/Counterdefendant;

9 Haynes and Boone, LLP,  
10 by Ralph J. Gabric, Esq.  
11 Laura Beth Miller, Esq.

12 - and -

13 RAI Services Company,  
14 Drew Leyes, Esq.

15 On behalf of the Defendant/Counterplaintiff.

16 ALSO PRESENT:

17 Scott Smith, Videographer

18 - - -

1 Q. So you mentioned that you took the top off the  
2 Smoke 51 two-piece device, correct?

3 A. Yes, sir.

4 Q. Did you investigate the internal structure of any  
5 other two-piece device prior to filing your  
6 provisional application?

7 A. Yes, I did.

8 Q. What other pieces did you investigate the internal  
9 structure of?

10 A. I specifically remember looking at a Loong Totem.  
11 I tore the cap off of it, too.

12 Q. Any others?

13 A. I believe there might have been others, but right  
14 now my memory, I cannot recollect that, which ones  
15 or how many.

16 Q. And so you can't say whether this device in  
17 Defendant's Exhibit 2, whether that's the Smoke 51  
18 two-piece that you ordered?

19 A. I can't say it is or isn't, but it very well may  
20 be.

21 Q. Why may it be? What causes you to say that?

22 A. Because all those cartomizers, before we made our  
23 engineering changes and our patented design, were  
24 all made the same.

25 Q. Had the same structure?

1 A. The same general build.

2 Q. What do you mean by same general build?

3 A. Where the heating element was in the batting  
4 material.

5 Q. And what do you mean by that?

6 A. The liquid holding area.

7 Q. So let's go through Defendant's Exhibit 2.

8 A. Can I ask before we begin the next question, can we  
9 have a quick break? I'm having a little bit of  
10 nicotine attack here.

11 MR. GABRIC: Yeah.

12 MR. THOMAS: Do you mind? We want to  
13 try to keep them short because we don't want to  
14 stretch the day out and I know you don't  
15 either.

16 MR. GABRIC: No, that's fine.

17 MR. THOMAS: We'll keep it down to a  
18 few minutes.

19 MR. GABRIC: Yeah, I don't want him to  
20 have nicotine withdrawal. You may, too, I  
21 don't know.

22 THE VIDEOGRAPHER: Okay. Off the  
23 record at 10:16.

24 - - - -

25 (Thereupon, a recess was had.)

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THE VIDEOGRAPHER: We are back on the  
record at 10:22.

Q. Okay. Back to Defendant's Exhibit 2, Mr. Conley.  
And I want to focus on this sketch. Now, did you  
have a piece with you contemporaneously with  
drawing this sketch?

A. I don't remember.

Q. And there's a squiggly line near the top of the  
piece. It looks like O something D or something.  
Do you know what that is?

A. I believe that's old.

Q. Okay. And what's that referring to?

A. As in the old preFuma design.

Q. And then there's a reference to the left. And when  
you say preFuma design, what do you mean?

A. I mean that this is how everything that I saw was  
manufactured and made before we manufactured our  
patented product.

Q. Now, did you understand that this -- this preFuma  
design was prior art to your invention?

MR. THOMAS: Object to the form of the  
question.

A. Can you ask the question in a different way?

Q. Yeah.

1 patent office?

2 MR. THOMAS: Objection; asked and  
3 answered.

4 A. I believe I already said I don't know who found the  
5 Wikipedia page, but I know it was included in the  
6 filing.

7 Q. So there's a reference here to heater, I believe,  
8 correct me if I'm wrong.

9 A. I'm sorry, where are you looking?

10 Q. I'm on the sketch, Exhibit 2.

11 A. Thank you. Okay.

12 Q. Is that word "heater"?

13 A. I believe that is the word, "heater."

14 Q. And what are you referring to here?

15 A. If you'll note it's pointing to a wire coming down  
16 the side and that wire is -- that portion of wire  
17 is the heating element.

18 Q. And what portion of that wire becomes heated, to  
19 the best of your understanding, when you sketched  
20 this?

21 A. This is a rough sketch, and there's no specific  
22 part of that wire that is directly heated. It  
23 could be any part of it, but it's specifically not  
24 in the center of airflow or in the airflow itself.

25 Q. Where -- where does the airflow travel through this

1 design you sketched?

2 A. I believe there's the word "airflow" at the bottom  
3 of the sketch pointing an arrow up the center  
4 middle.

5 Q. And where does the airflow exit?

6 A. Well, in this particular sketch, it appears to be  
7 in the top center.

8 Q. So there's an aperture for airflow in the bottom  
9 center and an aperture for airflow coming out at  
10 the top center of this cartridge?

11 A. In this particular drawing.

12 Q. And is this an accurate depiction of the Smoke 51  
13 two-piece device that you had ordered?

14 A. Yes, as well as many others.

15 Q. Now, I see a heater wire and it looks like -- where  
16 does it begin and where does it end?

17 A. I'm sorry, where are you looking?

18 Q. Well, you have the heater with an arrow to a wire  
19 you referred to, and --

20 A. Yes.

21 Q. -- I'm trying to figure out when you sketched this  
22 where does the wire begin and where does the wire  
23 end.

24 A. Well, it appears from the drawing that the wire at  
25 one end is terminated to the side. If you note at



1           Furthermore, you will get -- the capillary  
2           action of the batting material lacks the capacity  
3           to flow at a consistent rate based on how tightly  
4           it's wound based on a lot of other factors as well.

5           And ultimately when the user begins to use it  
6           at a very high rate you will end up burning the  
7           batting material, thus causing a burn flavor and  
8           causing the cartridge to go bad early when there's  
9           plenty of liquid in it and that's just the  
10          beginning of the problems.

11       Q.    You referred to batting material.  What do you  
12             mean?

13       A.    It's a solution holding medium.  You can use any  
14             number of ways to do this, but in this particular  
15             original design, they used a cotton material,  
16             batting material of sorts, to suspend the liquid in  
17             so that the liquid had something it was adhering to  
18             within the cartridge.

19       Q.    Now, did the batting material in the Smoke 51  
20             cartomizer surround the airflow channel?

21       A.    It appeared to.

22       Q.    And is that illustrated in Defendant's Exhibit 2?

23       A.    The batting material is not necessarily exhibit --  
24             shown here.  It's implied, but, again, it appears  
25             to be that that's the way it's drawn.

1 Q. What's incorrect about that?

2 A. It didn't -- it didn't have to and not all of them  
3 did, and while -- where I'm discussing is the  
4 products at that time. Smoke 51 is part of that  
5 corral of products, but -- and I believe the  
6 Smoke 51 did use the threads to pass power;  
7 however, I'm not sure every one did.

8 Q. Right. And we're focused on the Smoke 51 two-piece  
9 that you ordered back in late 2008 and you took the  
10 top off of the cartomizer. That's what I want to  
11 focus on. Are you with me?

12 MR. THOMAS: Object to the form of the  
13 question, misrepresents prior testimony.

14 Q. Are you with me?

15 A. I understand that's what you're inquiring about.

16 Q. Okay.

17 A. However, I'm -- I think that I'm -- I'm clear about  
18 the fact that they -- this is a general category of  
19 products.

20 Q. And in the Smoke 51 Duo that you took the top off  
21 prior to filing your provisional applications, that  
22 product had a battery as a power source, correct?

23 A. It could.

24 Q. Did it or did it not, the one you had in your  
25 possession?

1 A. I had ones that did.

2 Q. And the ones you had in your possession had a  
3 threaded connection between the cartomizer and the  
4 battery, correct?

5 A. Correct, they used an inclined plane that was a  
6 thread.

7 Q. And just so we're clear, you like to call a  
8 threaded connection an inclined plane. That's what  
9 we're referring to.

10 A. It's one version of an inclined plane.

11 Q. And the version of an inclined plane that the Smoke  
12 51 Duo had is a threaded connection version of an  
13 inclined plane, correct?

14 A. The thread --

15 MR. THOMAS: Object to the form of the  
16 question.

17 Q. A threaded connection.

18 MR. THOMAS: Object to the form of the  
19 question, if that was a question. Go ahead, if  
20 you understand.

21 A. I don't.

22 Q. You don't understand what a threaded connection is?

23 A. I do understand what a threaded connection is, but  
24 they all used an inclined plane to connect and  
25 whether the inclined plane was short or long it



1       the central axial passage airflow that we've placed  
2       it in. And that -- and that shows, and you'll see,  
3       "Place heating element in the center with the  
4       wicking material extending into the medium."

5               It goes on to say some more, but the gist of  
6       it is this is the beginning concepts. This is the  
7       ground -- the foundational groundwork for the  
8       Fuma-designed cartomizer.

9   Q.   So just so I'm clear, so then GEN 2 is near my what  
10       was done before you and then as we get to GEN 3,  
11       that's transitioning into your inventive work. Am  
12       I understanding that incorrectly?

13  A.   Into our inventive work, yes.

14  Q.   So how did you -- who came up with the idea of  
15       placing the heating element in the airflow channel  
16       with this -- with the wick material?

17  A.   Actually, it would be the heating element in or  
18       around the airflow. The key with it is that, yes,  
19       the heating element is in the airflow or around the  
20       airflow. The real key behind this, and I'll go  
21       back to Claim 1, it's vaporizing the solution into  
22       a vapor in the airflow and that -- that original  
23       idea was mine.

24  Q.   And when did you have that idea?

25  A.   It was -- it was in two thousand -- it was in 2009.

1 Q. Before the provisionals?

2 A. Yes.

3 Q. You seem pretty certain of that.

4 A. Yeah, I am very certain of that.

5 Q. Why are you so certain of that?

6 A. Because it was a major aha moment for me, as I was  
7 so told --

8 Q. I love that band.

9 A. -- what an aha moment is. Yeah, right.

10 Q. And what do you mean by "aha moment"? I think most  
11 of us do know, but somebody looking at this . . .

12 A. It's the moment that it -- that all the pieces of  
13 the puzzle come together and you have that creative  
14 idea of how to solve a very complex problem, and  
15 this is an extremely complex problem.

16 Q. And so this aha moment, it consisted of conceiving  
17 the idea of putting the heating element in the  
18 airflow?

19 A. It consisted of vaporizing the solution in or  
20 around the airflow so that the vaporization process  
21 actually takes place in the actual airflow.

22 Q. And where were you when you had this aha moment?

23 A. I don't remember. I -- it was -- I was -- but  
24 you've got to understand at that point in time I  
25 was thinking about this all the time.

1 Q. Was anybody with you when you had this aha moment?

2 A. I remember being alone for this part of the aha  
3 moment.

4 Q. And who did you report this aha moment to, if  
5 anyone? Who was the first person you reported it  
6 to?

7 A. That would be Rebecca, my wife.

8 Q. And how soon after this aha moment did you report  
9 it to her?

10 A. I don't remember. It was shortly after, but I  
11 don't -- I couldn't give you exact timing.

12 Q. Where were you when you reported it to her?

13 A. I don't remember.

14 Q. Where did --

15 A. I remember telling her. That's all I remember.

16 Q. What did you tell her?

17 A. "I figured out the problem."

18 Q. I'm assuming you said more than that, but maybe I'm  
19 wrong. You just said, "I figured out the problem"  
20 or did you elaborate?

21 A. I probably elaborated, but, I mean, I don't  
22 remember the exact conversation. I know I was  
23 complaining to her about using this other product  
24 and I was so absolutely frustrated as a prior  
25 smoker.

1                   probably a good time to --

2                   MR. THOMAS:   Okay, I've got some  
3                   redirect, so whenever you're finished you just  
4                   let me know.

5                   MR. GABRIC:   Okay.   I'm finished.

6                   MR. THOMAS:   Okay.

7                                   - - - -

8                   DIRECT EXAMINATION OF GREGORY D. CONLEY

9                   BY MR. THOMAS:

10   Q.   Do you recall you had given some testimony earlier  
11       today, Mr. Conley, concerning a Smoke 51 device, a  
12       Kanger device and a Loong Totem two-piece design, I  
13       believe you called it.   Do you recall that?

14   A.   Yes, I do.

15   Q.   Okay.   Were there any differences, to your  
16       knowledge, between the two-piece devices that I  
17       just described?

18   A.   No.   As far as how they functioned, they all  
19       functioned the same and they were all built the  
20       same.   I pulled the top off of all of them, looked  
21       down in there, saw the same burnt batting material.  
22       All of them were identical.

23   Q.   Where did you see -- when you pulled the top off  
24       and looked inside, what did you notice, if  
25       anything, about where the heating element was?



1 A. It was the same configuration, all three. The  
2 heating element went down through the batting  
3 material and was the source of all the problems I  
4 initially encountered when I got into this  
5 industry.

6 Q. I'm going to show you what we've marked as Exhibit  
7 2 or if you could pull it out. We marked it as  
8 Exhibit 2 earlier in the case. Could you pull that  
9 out?

10 A. Okay. I have that document here.

11 Q. Hang on a second. I've got to find mine.  
12 Hold on. I've got the wrong exhibit number.

13 A. It's not Exhibit 2?

14 MR. THOMAS: It's not Exhibit 2.

15 A. Okay.

16 MR. JORDAN: It's -- hang on. We just  
17 have to find it in our copy.

18 A. No worries.

19 Q. Yes, Defendant's Exhibit 2. I did have the right  
20 one, so if you could pull that out, please.

21 A. Okay.

22 Q. You were asked some questions about the image  
23 that's shown on the left that I believe Mr. Gabric  
24 had you mark some pieces of. Do you recall that?

25 A. Yeah, he had me mark that up on Exhibit 2 A, which